

§ 290.7

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or exemptions cited which provide the basis for denying the requested records.

(vii) Ensuring that documents are marked FOUO at the time of their creation if information contained within is considered exempt from disclosure.

(5) The General Counsel is responsible for:

(i) Ensuring uniformity is maintained in the legal position, and the interpretation of the Freedom of Information Act, DoD 5400.7–R, and this rule.

(ii) Consulting with General Counsel, DoD on final denials that are inconsistent with decisions of other DoD components, involving issues not previously resolved, or raise new or significant legal issues of potential significance to other Government agencies.

(iii) Providing advice and assistance to the Assistant Director, Resources; Regional Directors; and the Regional FOIA Coordinators, through the DCAA Information and Privacy Advisor, as required, in the discharge of their responsibilities.

(iv) Coordinating Freedom of Information Act litigation with the Department of Justice.

(v) Coordinating on Headquarters denials of initial requests and administrative appeals.

(vi) Ensuring that documents are marked FOUO at the time of their creation if information contained within is considered exempt from disclosure.

(6) The Executive Officer shall serve as the coordinator for the release of information to the news media.

(b) Each Regional Director is responsible for the overall management of the Freedom of Information Act program within his respective region. Under his direction, the Regional Resources Manager is responsible for the management and staff supervision of the program and for designating a regional FOIA Coordinator.

(1) Regional Directors are responsible for:

(i) Implementing and administering the Freedom of Information Act program throughout the region.

(ii) Making the initial determination pertaining to the releasability of DCAA records to members of the public. This authority cannot be delegated.

(iii) Delegating signature authority for FOIA correspondence which is considered only to be routine in nature, e.g., referrals and the release of information.

(iv) Ensuring that documents are marked FOUO at the time of their creation if information contained within is considered exempt from disclosure.

(2) FOIA Coordinators are responsible for:

(i) Issuing regional instructions that are consistent with the policies and procedures defined in DCAAP 5410.14 and this rule.

(ii) Conducting training on the FOIA program to the FAOs.

(iii) Submitting a DCAA Form 5410–4, “Freedom of Information Case Summary”, to the DCAA Information and Privacy Advisor at the completion of each FOIA case to facilitate the preparation of the annual FOIA report to Congress. All case summaries must be submitted no later than October 10th for cases completed during the previous fiscal year.

(iv) Establishing and maintaining a control system to ensure proper accountability and processing of FOIA requests.

(v) Contacting the DCAA Information and Privacy Act Advisor for a FOIA case number upon receipt of a FOIA request.

(c) Managers, Field Audit Offices (FAOs) are responsible for:

(1) Overall management and administration of the FOIA program within organizations under their cognizance.

(2) Ensuring that the regional FOIA Coordinator promptly receives all incoming FOIA requests. Use of facsimile transmission is appropriate for all requests received directly by the FAO.

(3) Ensuring that documents are marked FOUO at the time of their creation if information contained within is considered exempt from disclosure.

[56 FR 49685, Oct. 1, 1991, as amended at 64 FR 1130, Jan. 8, 1999]

§ 290.7 Procedures.

(a) Procedures for processing material in accordance with the FOIA are outlined in DCAAP 5410.14. General provisions are outlined in the following paragraphs.

(b) *Requests for audit reports.* Audit reports prepared by DCAA are the property of and are prepared for the use of DoD contracting officers. As a result, their release should be at the sole discretion of the DoD contracting activity. Requesters seeking audit reports should send their requests directly to the DoD contracting activity to avoid administrative delay. Typically, requests for copies of DCAA audit reports may be identified by requesting those that relate to a specific contract number (e.g. DLA600-89-P0222). DoD contract numbers may be easily matched to the cognizant DoD contracting activity by referring to 48 CFR, “DoD FAR Supplement” Appendix G.

NOTE: Although DCAA can make a release determination on audit reports produced for non-DoD agencies, administrative procedure routinely dictates coordination with that agency prior to responding to the request. Requesters seeking expeditious processing should forward their requests directly to the cognizant contracting officer for processing.

(c) *Requests for audit working papers.* Audit working papers, as described in appendix D, may be sought occasionally in conjunction with an audit report or as an independent demand. Normally, the release of such records is entirely dependent on the releasability of the related audit report. (Note: The procedures for determining the releasability of audit reports is provided in general in the aforementioned paragraph and in more detail in DCAAP 5410.14). Since the content of audit working paper files can be quite diverse and often voluminous, FOIA Coordinators should work closely with the requester to ensure that the records produced are narrowly defined and entirely responsive to the requester’s needs.

(d) *Public inspection and copying.* Section (a)(2) of the Freedom of Information Act requires agencies to make available for public inspection and copying, final opinions made in the adjudication of cases, statements of policy not yet published in the FEDERAL REGISTER, and administrative manuals and instructions. This requirement is satisfied by the publication of DCAAI 5025.2,⁵ “DCAA Index of Publications”

and DCAAI 5025.13,⁶ “Index of DCAA Memorandums for Regional Directors”.

(e) *Requests for the examination or copies of records.* (1) Members of the public may make written requests for copies of DCAA records or for permission to examine such records during normal business hours. Such requests must be in writing and either explicitly or implicitly invoke the Freedom of Information Act, or this rule. These requests should be submitted directly to the appropriate DCAA organizational element listed in appendix B of this rule. If the appropriate DCAA organizational element is either unknown or cannot be ascertained, and the record is likely to be in the possession of DCAA, the request may be submitted to Defense Contract Audit Agency, Attn: CM, 8725 John J. Kingman Road, Suite 2135, Fort Belvoir, VA 22060-6219.

(2) When submitting requests, requesters should:

(i) Identify each record sought with sufficient detail to facilitate the location and easy access to the record requested. Information as to where the record originated, subject, date, number, or any other identifying particulars should be provided whenever possible. DCAA organizational elements receiving requests which do not reasonably describe the record requested will advise the requester accordingly. Generally, a record is not reasonably described unless the requester provides information permitting an organized, nonrandom search of DCAA files and/or information systems. In providing descriptions based on events, the requester must provide information which permits DCAA organizational elements to, at least, infer the specific record sought.

(ii) Identify all other Federal agencies subject to the provisions of the FOIA to which the request has been sent. This will reduce both processing and coordination time between agencies and redundant referrals.

(iii) Provide a statement of their willingness to pay assessable charges. The statement must include a specific monetary amount if the assessable fees are likely to exceed the fee waiver

⁵ See footnote 3 to § 290.4(c).

⁶ See footnote 3 to § 290.4(c).

threshold of \$15.00 or a specific justification for any waiver or reduction of fees sought based on public interest in release or disclosure. DCAA organizational elements will notify requesters of deficiencies in fee declarations, and provide them the opportunity to amend initial declarations. Determinations on the adequacy of requester fee declarations are not subject to appeal unless: The DCAA organizational element has denied a specific request for the assessment of fees under one of the established requester categories; or has denied a request for the waiver or reduction of fees in the public interest.

(3) When a DCAA organizational element has no records responsive to a request, the requester will be notified promptly that should he or she determine such request to be adverse in nature, he or she may exercise their appeal rights. In cases where the request has been misdirected and the DCAA organizational element is aware of the appropriate FOIA respondent, they shall refer the request to the appropriate DCAA organizational element or other Federal agency through FOIA channels, and notify the requester of the referral. The 20 working day period allowed for responding to requests will not begin until the DCAA organizational element having the responsive records receives a request complying with procedural requirements of this rule, including statements on the payment of fees.

(4) The provisions of the FOIA are intended for parties with private interests. Officials seeking documents or information on behalf of foreign governments, other Federal agencies, and state or local agencies should be encouraged to employ official channels. The release of records to individuals under the FOIA is a public release of information. DCAA organizational elements will consider FOIA requests from such officials as made in a private, rather than official capacity, and will make disclosure and fee determinations accordingly.

(f) *Referrals.* (1) Records originating in or based on information obtained from other Federal agencies subject to the FOIA may be referred to that agency. In processing FOIA requests for such records, DCAA elements, after co-

ordinating with the originating agency, may refer the request, along with a copy of the responsive records in its possession, to that agency for direct response. The requester is to be notified of the referral. However, if for investigative or intelligence purposes, the outside agency desires anonymity, FOIA Coordinators may only respond directly to the requester after coordination with the agency.

(2) Referral of audit reports. Audit reports prepared by DCAA are the property of and are prepared for the use of the DoD contracting officers. Their release is at the discretion of the DoD contracting activity. Therefore any FOIA request for audit reports prepared for DoD components should be referred to the cognizant DoD contracting activity and the requester notified of the referral. To avoid the delay associated with the referral process, requesters should be advised to send requests for audit reports directly to the cognizant DoD contracting activity. Requests for audit reports prepared for non-DoD agencies should be treated as requests for DCAA records.

(3) Referral of work papers. When a requester seeks workpapers, the cognizant contracting officer must furnish a notice of disposition to the appropriate activity pertaining to the releasability of the audit report. The notice of disposition will then be used to determine releasability of the workpapers. Details concerning the appropriate processing procedures may be found in DCAAP 5410.14.

(4) All other requests should be directed to the appropriate Regional Director, if known. When the location of the record is not known, the request should be directed to the DCAA Information and Privacy Advisor.

(5) Time limits. DCAA organizational elements are to respond promptly to requesters complying with the procedural requirements outlined in this rule. When a significant number of requests are being processed, e.g. 10 or more, the requests shall be completed in order of receipt. However, this does not preclude completing action on a request which can be easily answered, regardless of its ranking within the order of receipt. Action may be expedited on a request regardless of its ranking

within the order of receipt upon a showing of exceptional need or urgency. Exceptional need or urgency is determined at the discretion of the FOIA Coordinator.

(i) Upon receipt of a properly submitted FOIA request, DCAA organizational elements should contact the DCAA Information and Privacy Advisor for a FOIA case number. IDAs should:

(A) Locate and assemble responsive records.

(B) Determine releasability under the provisions of this rule.

(C) Determine the appropriate fees to be charged and

(D) Advise the requester accordingly. Initial determinations on either the release or denial of records, and notice to requesters, must be provided within 20 working days following receipt of the request by the cognizant DCAA organizational element.

(ii) In certain cases, IDAs may need to exercise an extension to the normal 20 working day period cited above. IDAs are to notify the requester, within the initial 20 working day period, of the extension, the circumstances necessitating it, and the anticipated date of a determination. Approved extensions are not to exceed 10 working days, and all extensions should be indicated on DCAA Form 5410-4, section 6. Circumstances where such extensions may be approved include:

(A) The record(s) sought are geographically located at places other than the DC+AA organizational element processing the request.

(B) The request requires the collection and review of a substantial number of records.

(C) The disclosure determination requires consultation with another DCAA organizational element or other Federal agency with a substantial interest.

(iii) As an alternative to the previously mentioned, DCAA organizational elements may seek informal agreements with requesters for extensions in unusual circumstances when time limits become an issue in the response to the request.

(iv) Misdirected requests should be referred within 20 working days to the proper Federal agency or DCAA organi-

zational element through FOIA channels, and the requester notified of the referral. The 20 working day period allowed for responding to requests will not begin until the DCAA organizational element having the responsive records receives the request.

(6) Initial disclosure determinations.

(i) Initial determinations to make records available may only be made by those IDAs designated in this rule.

NOTE: Requests for audit reports should be directed to the cognizant contracting officer for release determination. (See § 290.7(b)).

When a decision is made to release records in response to a FOIA request, DCAA organizational elements will promptly make the records available to the requester. When the request is for the examination of releasable records, DCAA organizational elements will advise the requester when and where he/she may appear. Examinations will be held during normal business hours. If a record is not provided in response to a FOIA request, the IDA will advise the requester, in writing, of the rationale for not providing the record.

(ii) IDAs should consult the Executive Officer, prior to releasing records on matters considered newsworthy or when releasing records to media representatives. Copies of all media requests should be submitted to the Executive Officer.

(iii) The following reasons, other than the statutory exemptions cited in the FOIA, are provided for not releasing a record in response to a FOIA request.

(A) The request is transferred to another DoD component, or to another Federal agency.

(B) The Agency determines through knowledge of its files and reasonable search efforts that it neither controls nor otherwise possesses the requested record.

(C) A record has not been described with sufficient particularity to enable the Agency to locate it by conducting a reasonable search.

(D) The requester has failed unreasonably to comply with procedural requirements, including payment of fees, imposed by this rule.

(E) The request is withdrawn by the requester.

(F) The information requested is not a record within the meaning of the FOIA and this rule.

(7) Denials. (i) A record in the possession and control of DCAA may be withheld *only* when the record falls within one or more of the nine categories of records exempt from mandatory disclosure under the FOIA, and the use of discretionary authority to release the record is determined to be unwarranted. (Note: Since audit reports are prepared for the use of DoD contracting officers, their release is at the discretion of the DoD contracting activity. To facilitate an expeditious response, requesters should send their requests directly to the DoD contracting activity. (See § 290.7(b)). The specific exemptions are detailed in DCAAP 5410.14.

(ii) Although exempt portions of records may be denied, nonexempt portions must be released to the requester when it can reasonably be assumed that the excised information could not be reconstructed. When a record is denied in whole, based on distortion or reconstruction potential, the IDA will prepare a response advising the requester of the determination, and the response will specifically state that it is not possible to reasonably segregate meaningful portions for release.

(iii) When a request for a record is denied in whole or in part, the IDA will inform the requester in writing of the specific exemption(s) on which the denial is based and explain the determination in sufficient detail to permit the requester to make a decision concerning appeal. The determination will also inform the requester of his/her appeal rights. All appeals should be made within 60 calendar days from the date of the initial denial, contain the reasons for the requester's disagreement with the determination, and be addressed to the Assistant Director, Resources, Defense Contract Audit Agency, 8725 John J. Kingman Road, Suite 2135, Fort Belvoir, VA 22060–6219.

(iv) Records or portions of records which have been previously released become part of the public domain, and cannot be denied thereafter.

(8) Administrative Appeals of Denials. (i) If the IDA declines to provide a record because he/she considers it exempt, that decision may be appealed by the requester, in writing, to the Assistant Director, Resources, DCAA.

NOTE: Normally, IDAs would not issue denials for requests for audit reports. The denial authority for such records generally rests with the cognizant DoD contracting activity. (See § 290.7(b)). The appeal should be accompanied by a copy of the letter denying the initial request. Such appeals should contain the basis for disagreement with the initial refusal. Appeal procedures also apply to the disapproval of a request for waiver or reduction of fees. A “no record” finding may be appealed which allows the requester to challenge the adequacy of the Agency's search. Records which are denied should be retained during the time permitted for appeal.

(ii) IDAs shall advise the requester that an appeal should be filed so that it reaches the designated appellate authority no later than 60 calendar days after the date of the initial denial letter. At the conclusion of this period, except for good cause shown as to why the appeal was not timely, the case may be considered closed; however, such closure does not preclude the requester from filing litigation for denial of his appeal. If the requester has been provided a series of determinations for a single request, the time for appeal will begin on the date of the last determination of the series. Records which are denied shall be retained for a period of six years to meet the statute of limitations of claims requirement.

(iii) Final determinations normally shall be made within 20 working days of receipt of an appropriately submitted appeal.

(9) Delay in responding to an appeal.

(i) When additional time is required to respond to the appeal, the final determination may be delayed for the number of working days (not to exceed 10 days) that were not utilized as additional time for responding to the initial request. Requesters shall be advised that, if the delay exceeds the statutory extension provision or is for reasons other than the unusual circumstances previously described, they may consider their administrative remedies exhausted. They may, however, without prejudicing their right of

judicial remedy, await a substantive response. DCAA shall continue to process the case expeditiously, whether or not the requester seeks a court order for release of the records, but a copy of any response provided subsequent to filing a complaint shall be forwarded to the Department of Justice through the DCAA General Counsel.

(ii) When the Assistant Director, Resources, DCAA, makes a determination to release all or a portion of the records on appeal, the records shall be made available promptly to the requester after compliance with procedural requirements. The final denial of a request will be made in writing, explain the exemption(s) invoked, advise that the material being denied does not contain meaningful portions that are reasonably segregable, and also advise the requester of the right of judicial review.

(10) Judicial action. A requester will be deemed to have exhausted his administrative remedies after he has been denied the requested record by the Assistant Director, Resources, or when the Agency fails to respond to his request within the time limits prescribed by the FOIA and this rule. The requester may then seek an order from a U.S. District Court in the district in which he resides or has his principal place of business; the district in which the record is situated; or in the U.S. District Court for the District of Columbia, enjoining the Agency from withholding the record and ordering its production.

[56 FR 49685, Oct. 1, 1991, as amended at 56 FR 56932, Nov. 7, 1991; 57 FR 15254, Apr. 27, 1992; 60 FR 35699, July 11, 1995; 64 FR 1131, Jan. 8, 1999]

§ 290.8 Fees.

(a) Fees shall be determined in accordance with the DoD fee schedule, which is detailed in DCAAP 5410.14. Fees reflect direct costs for search, review (in the case of commercial requesters), and duplication of documents, collection of which is permitted by the FOIA. Fees are subject to limitations on the nature of assessable fees based on the category of the requester; statutory and automatic waivers based on the category determination and cost of routine collection; and either the

waiver or reduction of fees when disclosure serves the public interest.

(b) Fees will not be charged when direct costs for a FOIA request are \$15.00 or less, the automatic fee waiver threshold, regardless of category.

(c) *Fee assessment.* In order to be as responsive as possible to FOIA requests, DCAA organizational elements should adhere to the following when assessing fees:

(1) Evaluate each request to determine the requester category and adequacy of the fee declaration. An adequate fee declaration requires a willingness by the requester to pay fees in an amount equal to, or greater than, the assessable charges for the request.

(2) Provide requesters an opportunity to amend inadequate fee declarations and provide estimates of prospective charges when required. When a requester fails to provide an adequate fee declaration within 30 days after notification of a deficiency, the request for information will be considered withdrawn.

(3) A requester's claims for assessment of fees under a specific category will be carefully considered. The IDA may require a requester to substantiate a claim for assessment under a claimed category. In the absence of requester claims, the IDA will determine the category into which a requester falls, basing its determination on all available information.

(4) When a DCAA organizational element disagrees with a requester claim for fee assessment under a specific category, the IDA will provide the requester with written determination indicating the following:

(i) The requester should furnish additional justification to warrant the category claimed.

(ii) A search for responsive records will not be initiated until agreement has been attained relative to the category of the requester.

(iii) If further category information has not been received within a reasonable period of time, the component will render a final category determination; and

(iv) The determination may be appealed to the Assistant Director, Resources, within 60 calendar days of the date of the determination.